Public Prosecutor v Tan Kok An

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45-1-1995
ABDUL MALIK ISHAK J
6 OCTOBER 1995

Criminal Law *— Dangerous Drugs Act 1952 (Malaysia) — Section 39B(1)(a) — Trafficking in dangerous drugs — Heroin recovered from accused's bag — Whether accused was an innocent carrier — Whether doctrine of wilful blindness applied — Whether accused had rebutted statutory presumptions - Dangerous Act 1952 s 37(d), (da)*

Evidence *— Hearsay —Telephone conversation — Witness who allegedly spoke to accused over telephone was not called to testify — Whether evidence concerning telephone conversation was admissible as evidence — Whether evidence concerning telephone conversation constituted hearsay evidence*

Evidence *— Adverse inference — Failure of prosecution to call material witness — Whether witness was essential in the unfolding of the prosecution case — Evidence Act 1950 s 114(g)*

Evidence *— Hearsay — Failure to object — Defence counsel did not object to admissibility of telephone conversation — Whether telephone conversation constituted hearsay evidence — Whether inadmissible evidence was rendered admissible by failure to object*

The police arrested one Lim Jin Kue ('Lim') with heroin. Under interrogation, Lim revealed that he obtained the heroin from one 'Ah An'. In the presence of the police, Lim telephoned Ah An, pretending that he wanted to buy heroin. He had also requested Ah An to deliver the heroin to his house ('the telephone conversation'). On the same night, the accused came to Lim's house. The accused, who was identified by Lim as Ah An, was carrying a plastic bag with him. The police arrested the accused and found a newspaper package containing heroin in the bag. The accused was then charged with trafficking in heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At trial, the prosecution did not call Lim as its witness, although Lim was present. Evidence concerning the telephone conversation between Lim and Ah An was adduced by the prosecution through police officers who heard the contents of the conversation from Lim. The defence, however, did not object to the admissibility of the conversation. When the defence of the accused was called, the accused claimed that he was an innocent carrier of the bag, as he was asked by one 'Gay Au' to deliver money to Lim. The prosecution's cross-examination of the accused revealed the involvement of one 'Sow Kiong' for the first time. The defence had also called a witness to give evidence that he heard Gay Au requesting the accused to send money to Lim The key issue before the court was whether the

evidence of the police officer in regard to the telephone conversation was admissible. A

Held, acquitting and discharging the accused:

(1) Though the defence did not object to the admissibility of the telephone conversation, what is inadmissible cannot become admissible by reason of the failure to object (see p 97E–F); *Wong Kok Keong v R* [1955] MLJ 13, *Packiam & Anor v PP* [1972] 1 MLJ 247 and *Lim Yam Hong & Co v Lam Choon & Co* AIR 1928 PC 127 followed. B

(2) A statement made by a person not called as a witness is inadmissible to prove the truth of the fact stated. As the purposes of the prosecution introducing the telephone conversation were solely to establish knowledge of the heroin on the part of the accused and that the accused was also known as Ah An, such evidence concerning the conversation amounted to hearsay evidence and was, therefore, inadmissible (see pp 97I and 98A); *Berkeley Peerage Case* (1811) 4 Camp 401 and *Healy v Jacobs* (1827) 5 LJOS KB 180 followed. C D

(3) Lim was an umbilical cord to link the accused with the heroin. Since Lim was able to give a first hand account of the whole episode but was not called by the prosecution, it was legitimate for the court to draw an inference under s 114 (g) of the Evidence Act 1950 against the prosecution (see p 98G); *Seneviratne v R* [1936] 3 All ER 36 and *Munusamy v PP* [1987] 1 MLJ 492 followed). E

(4) On perusal of the questions posed by the prosecution pertaining to the role of Sow Kiong, one has no doubt that he too played an important part in the unfolding of the narrative for the prosecution case. It was therefore not wrong to draw an adverse inference against the prosecution who being in a position to produce better evidence deliberately abstained from doing so (see p 99B); *Gopal Krishnaji v Md Haji* AIR 1968 SC 1413 followed. F G

(5) The doctrine of wilful blindness has to be applied rigorously when one considers the question of knowledge. To apply the doctrine of wilful blindness successfully, relevant inferences have to be drawn from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. Where the case for the prosecution is water tight, the doctrine of wilful blindness should fail (see p 101F–H); *R v Griffiths* (1974) 60 Cr App R 14 followed; *PP v Hla Win* [1995] 2 SLR 424 distinguished. H

(6) The accused had succeeded in creating a reasonable doubt as to his guilt. The defence evidence had also rebutted the statutory presumption under s 37(d) and (da) of the Act (see p 102C–F); I

A Mat v PP [1963] MLJ 263, *Mohamed Radhi bin Yaacob v PP* [1991] 3 MLJ 169 and *Sochima Okoye v PP* [1995] 1 MLJ 538 followed.

[Bahasa Malaysia summary

B Pihak polis telah menangkap seorang yang bernama Lim Jin Kue ('Lim') atas kesalahan memiliki heroin. Lim telah memberitahu polis semasa soal siasat bahawa heroin tersebut telah diperolehi daripada seorang yang bernama 'Ah An'. Lim kemudiannya menelefon Ah An dalam kehadiran pihak polis, dan dia berlagak bahawa dia ingin membeli heroin. Dia juga meminta Ah An supaya menghantar heroin C tersebut ke rumahnya ('perbualan telefon tersebut'). Pada malam itu juga, tertuduh datang ke rumah Lim. Tertuduh, yang telah dikenali oleh Lim sebagai Ah An, membawa sebuah beg plastik bersamanya. Pihak polis menangkap tertuduh dan menjumpai sebuah bungkusan suratkhabar yang mengandungi heroin dalam bag itu. Tertuduh D kemudiannya telah dituduh mengedar heroin di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Semasa perbicaraan, pihak pendakwa tidak memanggil Lim untuk memberi keterangan walaupun Lim hadir. Keterangan perbualan telefon tersebut antara Lim dan Ah An telah dikemukakan oleh pihak pendakwa melalui pegawai-pegawai polis yang telah diberitahu isi kandungannya oleh E Lim. Walau bagaimanapun, pihak pembela tidak membantah terhadap kebolehterimaan perbualan telefon tersebut. Apabila pembelaan tertuduh dipanggil, tertuduh telah mendakwa bahawa dia merupakan seorang pembawa beg yang tidak bersalah, kerana dia telah diminta oleh seorang yang bernama 'Gay Au' untuk menghantar duit kepada F Lim. Pemeriksaan balas pihak pendakwa ke atas tertuduh telah menunjukkan penglibatan seorang yang bernama 'Sow Kiong' buat kali pertamanya. Pihak pembela juga memanggil seorang saksi untuk memberi keterangan bahawa dia terdengar Gay Au meminta tertuduh supaya menghantar duit kepada Lim. Isu penting yang harus dipertimbangkan oleh mahkamah ialah sama ada keterangan pegawai G polis berkenaan dengan perbualan telefon tersebut boleh diterima.

Diputuskan, membebas dan melepaskan tertuduh:

(1) Walaupun pembelaan tidak membantah terhadap kebolehterimaan perbualan telefon tersebut, apa yang tidak boleh diterima tidak H boleh menjadi boleh terima akibat kegagalan untuk membantah (lihat ms 97E–F); *Wong Kok Keong v R* [1955] MLJ 13, *Packiam & Anor v PP* [1972] 1 MLJ 247 dan *Lim Yam Hong & Co v Lam Choon & Co* AIR 1928 PC 127 diikut.

(2) Sesuatu kenyataan yang dibuat oleh seseorang yang tidak dipanggil I sebagai saksi tidak boleh diterima untuk membukti kebenaran fakta yang dinyatakan itu. Oleh kerana tujuan pihak pendakwa mengemukakan perbualan telefon adalah semata-mata untuk

membuktikan bahawa tertuduh mempunyai pengetahuan berkenaan dengan heroin tersebut, dan bahawa tertuduh juga dikenali sebagai Ah An, keterangan perbualan telefon tersebut merupakan keterangan dengar cakap. Oleh itu, ia tidak boleh diterima (lihat ms 97I dan 98A); *Berkeley Peerage Case* (1811) 4 Camp 401 and *Healy v Jacobs* (1827) 5 LJOS KB 180 diikut.

(3) Lim merupakan seorang saksi terpenting yang boleh mengaitkan tertuduh dengan heroin. Oleh kerana Lim yang dapat memberi keterangan mengenai keseluruhan kejadian secara langsung tidak dipanggil oleh pihak pendakwa, adalah wajar untuk mahkamah membuat suatu inferens yang memudaratkan kes pendakwaan di bawah s 114(g) Akta Keterangan 1950 (lihat ms 98G); *Seneviratne v R* [1936] 3 All ER 36 dan *Munusamy v PP* [1987] 1 MLJ 492 diikut.

(4) Jika soalan yang dikemukakan oleh pihak pendakwa tentang peranan Sow Kiong diperiksa, adalah jelas bahawa dia juga memainkan peranan yang penting dalam pembentangan kes pendakwaan. Oleh yang demikian, adalah tidak salah jika mahkamah membuat suatu inferens yang memudaratkan kes pendakwaan kerana pihak pendakwa boleh mengemukakan keterangan yang lebih baik, tetapi enggan berbuat demikian (lihat ms 99B); *Gopal Krishnaji v Md Haji* AIR 1968 SC 1413 diikut.

(5) Doktrin 'kebutaan sengaja' ('wilful blindness') harus digunakan dengan ketatnya apabila soalan pengetahuan dipertimbangkan. Supaya doktrin tersebut digunakan dengan berjayanya, inferens yang relevan harus dibuat daripada semua fakta dan keadaan sesuatu kes itu, dan perhatian yang sewajarnya harus diberi, di mana perlu, kepada kebolehpercayaan saksi. Di mana kes pendakwaan adalah amat kuat, doktrin 'kebutaan sengaja' seharusnya gagal (lihat ms 101F–H) ; *R v Griffiths* (1974) 60 Cr App R 14 diikut; *PP v Hla Win* [1995] 2 SLR 424 dibeza.

6) Tertuduh telah berjaya menimbulkan keraguan munasabah tentang kebersalahan beliau. Keterangan pembelaan juga telah mematahkan anggapan statutori di bawah s 37(d) dan (da) Akta tersebut (lihat ms 102C–F); *Mohamed Radhi bin Yaacob v PP* [1991] 3 MLJ 169 dan *Sochima Okoye v PP* [1995] 1 MLJ 538 diikut.]

Notes

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 26–108; [1989] Mallal's Digest 592–621; [1990] Mallal's Digest 463–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 657–671; [1993] Mallal's Digest 526– 538; [1994] Mallal's Digest 849–870.

For cases on hearsay, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1004–1006.

For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 77–119.

Cases referred to

Berkeley Peerage Case (1811) 4 Camp 401
Gopal Krishnaji v Mohd Haji AIR 1968 SC 1413
Healey v Jacobs (1827) 5 LJOS KB 180
Jagroop v R AIR 1952 All 276
Lim Yam Hong & Co v Lam Choon & Co AIR 1928 PC 127
Mat v PP [1963] MLJ 263
Mohamed Radhi bin Yaacob v PP [1991] 3 MLJ 169
Munusamy v PP [1987] 1 MLJ 492
Packiam & Anor v PP [1972] 1 MLJ 247
PP v Abdul Aziz bin Yusof [1993] 1 CLJ 138
PP v Chin Hock Aun [1989] 1 MLJ 509
PP v Chuah Kok Wah [1994] 2 CLJ 423
PP v Hla Win [1995] 2 SLR 424
PP v Jul bin Alih [1989] 2 MLJ 63
R v Griffiths (1974) 60 Cr App R 14
Seneviratne v R [1936] 3 All ER 36
Subramaniam v PP [1956] MLJ 220
Sochima Okoye v PP [1995] 1 MLJ 538
Teper v R [1952] AC 480; [1952] 2 All ER 447
Ti Chuee Hiang v PP [1995] 2 MLJ 433
Wong Kok Keong v R [1955] MLJ 13

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da)(i), 39B(1)(a), (2)
Evidence Act 1950 s 114(g)

Mohd Zawawi bin Salleh (Deputy Public Prosecutor) for the Public Prosecutor
Hisham Teh Poh Teik (*Teh Poh Teik & Co*) for the accused.

Abdul Malik Ishak J: The accused was acquitted and discharged after his defence was called upon the following charge:

> Bahawa kamu pada 11 September 1993 lebih kurang jam 9.45 malam, di sebuah rumah no 55, Jalan Kekabu 7, Taman Desa Cemerlang, Ulu Tiram, dalam daerah Johor Bahru, dalam Negeri Johor telah di dapati mengedar dadah berbahaya iaitu 45.7g heroin dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh di hukum di bawah seksyen 39B(2) Akta yang sama."

The facts garnered from the prosecution witnesses can be stated thus.

On 11 September 1993 at 2.25am, Chief Insp Nordin bin Kadir ('Nordin') led a police party and raided house No 55, Jalan Kekabu 7, Taman Desa Cemerlang, Ulu Tiram ('the house'). In the house, Nordin and his police party arrested Lim Jin Kue ('Lim') and Yoo Nai Chau ('Yoo'). The house belonged to Lim, and in Lim's room, the police recovered some drugs. In Yoo's wallet, the police also recovered four plastic packets of heroin. In regard to these arrests, Nordin lodged a police

report vide Ulu Tiram report No 3364-6/93 ('P18'). Under interrogation, Lim buckled and revealed that he obtained the drugs from one person by the name of Ah An who hailed from Masai who would normally send the drugs to Lim at Lim's house. Lim also said that he could contact Ah An via the pager system. Later, at the police station in the presence of Nordin, Detective Lance Corporal Chong Chin Sin ('Chong') and Detective Sergeant Choong Kuè Hin ('Choong'), Lim contacted Ah An twice through his own handphone, and succeeded in contacting Ah An via Ah An's pager. Ah An returned Lim's call and both of them spoke in the Hokkien dialect. According to Choong, the conversation between Lim and Ah An in the Hokkien dialect went like this:

Lim said: 'Ada barang ke? Saya mahu setengah kereta.'

According to Chong, the words 'setengah kereta' referred to half a pound of heroin. Chong then testified that Lim told him that Ah An would deliver the heroin to the house before midnight of that night. Chong then translated what had transpired to Nordin. Nordin testified that the telephone conversation between Lim and Ah An lasted for 2 –3 minutes only. I shall revert to this piece of evidence in the later part of this judgment. Based on this information, Nordin swung into action. Nordin called for a meeting, and there he briefed his police personnel in regard to the raid that was scheduled to take place in that house. After the briefing, Nordin led his police party together with Lim to that house on 11 September 1993, and they arrived there at about 7pm. They then waited for the arrival of Ah An. In that house, Nordin located himself in the master bedroom overlooking the road as reflected in photographs 'P18A', 'P18B', 'P18H' and at 'F' of the sketch plan ('P11') together with Lim, Chong and Choong. The rest of the police party took up positions in the other parts of the house. Incidentally, that was the master bedroom of Lim. The area outside the house was quite bright as the street light located directly in front of the house was lighted then. At about 9.45pm, Nordin and Chong saw a dark grey van (photographs 'P9A' and 'P9B') arrived, and stopped by the side of the road along Jalan Kekabu 7. A male Chinese was seen alighting from the van and, whilst walking along Jalan Kekabu 7, was seen carrying a transparent plastic bag (photographs 'P7A' and 'P7F') in his right hand. At this point of time, Lim who also witnessed the same incident remarked in Hokkien dialect to Chong: 'Itu adalah Ah An.' This was quickly translated to Nordin. Without furtherado, Nordin directed Chong to escort Lim to the main door of the house, and there Lim was directed to open the main door partially (photographs 'P8B' and 'P8E') and the grille thereto (photograph 'P8D') in order to show his face to Ah An. Lim obliged and having done that, Chong then escorted him to the master bedroom. Meanwhile, Nordin and Detective Corporal Jamaluddin bin Tan ('Jamaluddin') stood behind the main door from inside which was partially opened. As the male Chinese entered the main door carrying the plastic bag in his right hand, Nordin introduced his office as 'polis', and Jamaluddin swiftly grabbed hold of the left arm of that male Chinese and twisted it to the rear and pushed him forcibly to the floor of the living room, face downwards. The plastic bag carried by the male Chinese dropped to the

floor of the living room. That male Chinese appeared shocked and he struggled, but was subdued by Jamaluddin and the rest of the police party. Nordin seized the transparent plastic bag and examined its contents in the presence of the male Chinese who was identified as the accused. Immediately inside the transparent plastic bag was a newspaper package ('P5B' and the photographs at 'P7B', 'P7C', 'P7D', 'P7E' and 'P7F'). On opening that newspaper package, Nordin saw a transparent plastic containing 'butiran' suspected to be dangerous drugs. In due course, the government chemist confirmed the dangerous drugs to be heroin weighing 45.7g.

It is abundantly clear that the accused was caught red-handed to have in his custody or under his control the transparent plastic bag which contained the heroin. The physical possession of the heroin triggered the provisions of section 37(d) of the Dangerous Drugs Act 1952 ('the Act'), in that the accused shall be deemed to have in his possession such drug and to have known the nature of such drug, until the contrary is proved. As the quantum of the heroin was 45.7g, by virtue of the provisions of section 37(da)(i) of the Act, the accused shall be presumed, until the contrary is proved, to be trafficking in the said drug. Encik Hisham Teh Poh Teik, the learned counsel for the accused, conceded that the prosecution succeeded in establishing a prima facie case against the accused and agreed that the defence should be called. The burden, therefore, shifted to the accused to rebut the presumptions on the balance of probabilities.

In his defence, the accused testified that at about 5.30pm on 11 September 1993, after he finished work at his father's shop, he proceeded to Michael's house at No 30, Jalan Hijau Muda 6, Taman Pelangi, Johor Bahru ('Pelangi house') to play mahjong. Upon arrival there, he saw four persons who were playing mahjong. He identified them as Michael (Ng Loke), Arthur (Tan Yau Cheng), Au Yang (Au Yong Chin) and Ah Nok (Chua Hak Tai). Michael surrendered his seat and let the accused played mahjong at about 6pm. Between 8.45–9pm, Gay Au turned up, and since he wanted to talk to the accused, the accused told him to wait for about 15 minutes. Gay Au waited, and when finally Gay Au spoke to the accused, it was within the hearing range of Michael. Gay Au requested the accused to send some money to Lim. According to Michael, he overheard Gay Au asking the accused to send the money which he won to someone but he did not know who that was. Thus, as soon as the accused and Gay Au left the premises of the Pelangi house, Gay Au proceeded to his car and collected a plastic bag which he said to contain money and handed it to the accused to be sent to Lim. The accused said that he accepted that assignment without being paid. The accused testified that he then placed the plastic bag in the glove compartment of the grey van as shown in photographs P9A and P9B without opening the plastic bag to see its contents. The accused believed Gay Au when he said that the plastic bag contained money as on two other occasions he had accompanied Gay Au to Lim's house for the same purpose. In other words, the accused least expected that the plastic bag contained drugs. On arrival at Jalan Kekabu 7, the accused parked the motor van (which belongs to the accused's mother), and held the plastic bag which was folded in his left hand, whilst his right

hand holding the ignition key of the motor van. The accused testified that he saw Lim's face appearing at the front main door of the house initially, and suspecting nothing amiss, he proceeded to enter the house. As soon as he entered the said house, someone grabbed hold of him and he put up a struggle but was eventually subdued. After he was arrested, he was then informed that they were police personnel. The accused testified that he saw the police examined the contents of the plastic bag and he was then told that it contained drugs. The accused testified that he immediately told the police about Gay Au and that the plastic bag contained money. Under cross-examination, the accused denied the following set of facts:

(1) that Lim had contacted him twice on the pager;

(2) that Lim had ordered half a pound of heroin through the telephone;

(3) that he telephoned Lim and promised to send half a pound of heroin before midnight to that house;

(4) that he was also known as Ah An;

(5) that Gay Au was a fictitious character; and

(6) that he knew that the plastic bag contained drugs.

It is germane to remember that although the accused agreed that if he wanted to open the plastic bag he could do so, yet he said that he did not open the plastic bag nor check its contents. The accused even said that although he held the plastic bag in his left palm (as demonstrated in Court) yet he could not feel the 'dadah' therein. He categorically stated that he did not know that the plastic bag contained drugs and, if he did, he would not have carried the drugs.

Surprisingly, in an unprecedented move, the learned deputy public prosecutor, Encik Mohd Zawawi bin Salleh, introduced an entirely different character during the cross-examination of the accused. This character never appeared at all during the prosecution's case and that character was Sow Kiong. No wonder the accused denied whatever allegations that tied him to Sow Kiong.

Michael ('SB2') testified on behalf of the accused and from the tenor of his evidence, Gay Au was also known as Ah Geh and that he had known Gay Au for approximately four months. Michael too confirmed that Gay Au requested a favour from the accused to send the money to someone.

It is crystal clear that the defence was one of innocent carrier. Of late, this defence is becoming popular, and invariably an accused person when caught red-handed would resort to this defence (see *PP v Jul bin Alih* [1989] 2 MLJ 63; *PP v Abdul Aziz bin Yusof* [1993] 1 CLJ 138; *PP v Chin Hock Aun* [1989] 1 MLJ 509; *PP v Chuah Kok Wah* [1994] 2 CLJ 423). In classical terms: 'I did not know it contained drugs. I knew it contained money', was the defence of the accused, and my task is to sort out the innocent from the guilty within the bounds of accepted legal principles. This is a demanding task, and there is no room for mistakes. What the prosecution now sought to argue was that this court should find that the story of the accused that he believed that he was carrying money as a mere

A fabrication, and that in truth he knew or ought to have known that he was carrying heroin. Encik Mohd Zawawi bin Salleh ably argued and brought home the message that the accused was not an innocent custodian of the plastic bag; and that the accused had opportunities to inspect the plastic bag, but sadly, he chose not to do so. The plastic bag was transparent and it was not locked. The newspaper which was inside that transparent plastic B bag too was not locked nor secured in such a fashion as to prevent inspection. It was said that the accused's lack of compulsion to check the contents of the plastic bag was an incredible piece of evidence that would be difficult to swallow. In truth, it was submitted, that the accused knew or that he must have known that he was carrying the drugs for Gay Au and, C consequently, he was trafficking it.

The prosecution sought to link knowledge on the part of the accused to the heroin that he carried that night to the house with the telephone conversation between the accused and Lim. Indeed that was a damning piece of evidence, if it was admissible. The prosecution too sought to D established that the accused was in fact Ah An through the reaction of Lim when he identified the accused as Ah An immediately before the accused was arrested. Again, this would be a damning piece of evidence, if it was admissible. The crucial question to ask is this: Whether the evidence of Nordin and Chong in regard to what Lim purportedly told them would be admissible, bearing in mind that Lim was not called but offered to the E defence? Though the defence did not object when such evidence was adduced, yet it is now trite that what is inadmissible cannot become admissible by reason of the failure to object and I must, therefore, disregard such evidence (see *Wong Kok Keong v R* [1955] MLJ 13 at p 16 as cited in *Packiam & Anor v PP* [1972] 1 MLJ 247; *Lim Yam Hong & Co v Lam Choon & Co* AIR 1928 PC 127 at p 128). In so far as what Lim purportedly F had said to Chong, and subsequently Chong translated those parts to Nordin, they can best be described as worthless. Chong's evidence is second hand whilst Nordin's evidence is third hand. Since Lim was not called by the prosecution, I am left to conjecture whether Lim actually uttered those words. Throughout the trial, Lim was present and his G presence was felt and seen each time he was identified by Nordin, Chong and even the accused. Without Lim, the best evidence was not produced by the prosecution. It is plainly obvious that the prosecution sought to establish through the back door the crucial ingredient of knowledge through what Lim purportedly had said to Chong, and who in turn translated it to H Nordin. The test to distinguish between direct and hearsay evidence is this: 'It is direct if, to act upon it, the court has to rely upon only the witness, whereas it is hearsay if it has to rely upon not only the witness but some other person also' (see Jagroop v R AIR 1952 All 276 at p 277). In lucid terms, Lord Normand in *Teper v R* [1952] AC 480; [1952] 2 All ER 447 explained it in this way: 'The rule against the admission of hearsay I evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.' Put

differently, it may be said that a statement made by a person not called as a witness (like Lim here) is inadmissible to prove the truth of the fact stated (*Berkeley Peerage Case* (1811) 4 Camp 401 HL at p 415; *Healy v Jacobs* (1827) 5 LJOS KB 180). There is also a danger that Chong and Nordin in their overzealous attempt to secure a conviction might concoct, fabricate and tailor their evidence to suit the charge levied against the accused. This must surely be the danger that compels the rule against the admission of hearsay evidence to be developed and refined over the years. The learned deputy public prosecutor sought to argue, quite forcefully, that he merely wanted to establish not the truth of the statement but the fact that it was made. This immediately brings to the forefront the decision of the Board in *Subramaniam v PP* [1956] MLJ 220 at p 222; [1956] 1 WLR 955 at p 970 where it was stated that:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

As stated earlier, the purposes of introducing Lim's purported statements through Chong and Nordin were solely to establish knowledge of the heroin in the plastic bag on the part of the accused, and that the accused was also known as Ah An. As knowledge is an essential ingredient of the offence of trafficking, the prosecution was in fact proposing to establish the truth of what Lim had said to Chong and Nordin, so as to secure a conviction against the accused. This is clearly wrong and should be avoided at all costs.

Next, it is undeniable that Lim was an important prosecution witness. He is the umbilical cord to link the accused with the heroin. Without Lim, the whole fabric of the prosecution's case collapsed to the ground like a deck of playing cards. Lim was certainly acquainted with the facts of the whole case and, though he was present throughout the trial, the prosecution took a perilous course in not calling him. Lim was able to give a first hand account of the whole sordid episode to the court, and by keeping him at bay, it is legitimate for me to draw adverse inference under s 114 (g) of the Evidence Act 1950. As Lord Roche in *Seneviratne v R* [1936] 3 All ER 36 said:

> ... witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

In the same vein, Mohamed Azmi SCJ (now FCJ) in *Munusamy v PP* [1987] 1 MLJ 492 SC aptly said:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any

document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

Now, in regard to the character by the name of Sow Kiong that suddenly surfaced during the cross-examination of the accused and on perusal of the questions posed by the learned deputy prosecutor pertaining to his role in the case, one is left with no doubt at all that he too played a part and an essential protagonist, so to speak, in the unfolding of the narrative for the prosecution's case. It would not therefore be wrong for me to draw an adverse inference against the prosecution, who being in a position to produce better evidence, deliberately abstain from doing so (see *Gopal Krishnaji v Md Haji* AIR 1968 SC 1413).

Reverting back to Lim, it is germane to mention that had he been called he would definitely confirm and allude to the following set of questions:

(1) whether he made two calls to the paging centre to locate Ah An?

(2) whether he in fact spoke to Ah An over the telephone on the day in question?

(3) whether he ordered half a pound of heroin from Ah An?

(4) whether the accused was known as Ah An or Gay Au?

(5) whether he told Chong in the presence of Nordin in his master bedroom that the accused, who was referred to as Ah An, had arrived?

Thus, in the absence of Lim, this court must tread cautiously and with circumspection. In the circumstances, when the accused testified under oath that he did not speak to Lim over the telephone, and that he did not promise to send half a pound of heroin to that house, this court has no choice but to accept such assertions as gospel truth. Only Lim can positively say whether he spoke to Ah An or Gay Au, but, alas, he was not called by the prosecution (see *Ti Chuee Hiang v PP* [1995] 2 MLJ 433).

It is my judgment, that the hearsay evidence rule would be rigorously applied so as to render inadmissible those parts which Lim purportedly said to Chong, who in turn purportedly translated to Nordin. Bereft of these juicy and cogent parts, so to speak, the case for the prosecution would solely rest on the evidence of Nordin, Chong and Jamaluddin to the effect that they saw the accused carry the plastic bag containing the heroin in his right hand to the house that night. At this juncture, the question to ask is this; has the defence succeeded in rebutting the presumptions on the balance of probabilities? The prosecution argued that Gay Au was nothing but a fictitious character coined up by the accused. To this argument, there is ample corroborative evidence through Michael that Gay Au in fact existed. In fact, had Lim been called, he would be able to rebut that part of the allegations by the accused that he went to the house twice prior to the arrest with Gay Au. It is my finding of fact, on the available evidence, that there was a person by the name of Gay Au and it was he that requested the accused to send the money to that house, in particular to

Lim. It is also my finding of fact that the accused was not known by the name of Ah An and he was not Ah An as alleged by the prosecution. Now, given this scenario, the accused's task of rebutting the presumptions on a balance of probabilities must surely have been rendered extremely difficult from the outset. As I said in the early part of this judgment, it is a common phenomenon for drug couriers to raise the now well-known and common defence that they were deceived by someone else and that they carried less incriminating articles other than drugs. Here, the accused pointed the blame to Gay Au, and he said that he was framed and deceived by Gay Au into believing that what he carried was money. This brings me to an interesting concept of wilful blindness as alluded to by Yong Pung How CJ (Singapore) in *PP v Hla Win* [1995] 2 SLR 424, where his Lordship in a dissenting judgment had this to say:

> It must be appreciated that the concept of wilful blindness qualifies the requirement of knowledge (see R v Griffiths (1974) 60 Cr App R 14). As Professor Glanville Williams aptly remarked in his textbook on *Criminal Law*, at p 125:
>
> > ' ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: "Where ignorance is bliss, 'tis folly to be wise." To argue away inconvenient truths is a human failing. If a person deliberately "shuts his eyes" to the obvious, because he "doesn't want to know", he is taken to know.'

In another part of the same judgment, Yong Pung How CJ (Singapore) observed:

> At this juncture, I emphasize that where the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in circumstances which rendered the taking of the precaution of satisfying himself that the goods were what they purported to be and were not drugs an imperative, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter.
>
> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

It is pertinent to note that in *PP v Hla Win*, the respondent there was acquitted of the charge of importing into Singapore 3,648g of diamorphine. The prosecution had appealed against the acquittal and the majority decision of the Singapore Court of Appeal upheld the acquittal and dismissed the appeal. LP Thean JA speaking for the majority, inter alia, had this to say (see the headnote at p 425):

> It was for the respondent to rebut the statutory presumptions of possession of the drugs and knowledge of the nature of the drugs. It was a difficult task in the circumstances because the respondent had the mens rea to smuggle

> gems and knew of the illicit nature of the content of the bag. Furthermore, the defence put forth by the respondent was one commonly used by drug couriers. However, it was not the law that by reason of the respondent's knowledge of the illicit nature of the contents of his bag, his evidence that he did not know that the contents were drugs could not and should never be believed. Such knowledge only rendered it more difficult for the court to believe his evidence. Very much depended on the circumstances of the case."

Here, the accused knew that he was delivering some money in the plastic bag to Lim. There was nothing illicit, in the context of this case, for the accused to carry that money in the plastic bag for delivery to Lim. This is the distinguishing feature between this case and that of *PP v Hla Win*. It is, therefore, far easier for this court to hold, as what was alleged by the accused, that he did not know that the contents of the plastic bag were drugs for, after all, he had accompanied Gay Au on two previous occasions to Lim's house for the purpose of sending money, and not drugs, there.

In *R v Griffiths* (1974) 60 Cr App R 14, where on a charge of handling stolen goods, contrary to s 22(1) of the Theft Act 1968, to direct the jury that the offence is established if the defendant, suspecting that the goods were stolen, deliberately shut his eyes to the circumstances as an alternative mode of proof of guilt to proof of knowledge or belief on the part of the defendant that the goods were stolen is a misdirection James LJ held, inter alia, that to direct the jury that, in common sense and in law, they may find that the defendant knew or believed the goods to be stolen because he may deliberately closed his eyes to the circumstances is a proper direction.

The time has come to apply rigorously the doctrine of wilful blindness when one considers the question of knowledge. In the Malaysian context, it is courteous to carry goods on behalf of one's friend to a third party. It is certainly discourteous to open those goods to see its contents before sending it to a third party. That would be the courteous behaviour of right-thinking Malaysians. But I hasten to add, lest I be accused of opening the floodgate, that to apply the doctrine of wilful blindness successfully to any particular case would be solely dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. Where the case for the prosecution is water tight, the doctrine of wilful blindness should fail. As James LJ said in *R v Griffiths*:

> Further, although the direction at p 10 could have been better expressed than in the words 'a man in law in those circumstances knows or believes, we are satisfied that the direction read in its entirety is that the jury had to be satisfied of either knowledge or belief and that one approach to that issue on the facts was to decide whether the appellant suspected the candlesticks were stolen and adopted an attitude of wilful blindness to the circumstances of receipt. We, therefore, conclude, after some doubt, that there was no misdirection and that the appeal fails on this point as it does upon the first point tabled. We would add that had we decided that there was in this

respect a misdirection, we would have had no hesitation in applying the proviso. The evidence was overwhelming and no reasonable jury on this evidence could have arrived at a conclusion other than that the appellant believed the goods were stolen.

In my judgment, the defence of the accused came squarely within the classical case of *Mat v PP* [1963] MLJ 263 ('Mat test') where Suffian J (as he then was) in simple and exact terms said:

> (c) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt ... acquit.

Without Lim, the accused can put up any probable line of defence so long as that defence can raise a reasonable doubt in the mind of the court as to his guilt. This was what was done by the accused, and I must say he has succeeded in creating a reasonable doubt in my mind as to his guilt in the context of the Mat test. There was no reason whatsoever for the accused to suspect that he carried heroin that day to the house in question. To the accused it was just an assignment to send the money to Lim, and the accused did not suspect anything fishy. There was no evidence that the accused had dealt in drugs with Lim prior to this as to impute knowledge on the part of the accused. Gay Au told the accused that the plastic bag contained money and the accused must have been willing to send that money to Lim and I hold as a fact, as adverted to by the accused, that the accused would not have carried that plastic bag had he known that it contained drugs. I have seen the accused performed in the witness box and I ruled that his credibility was par excellence. This is also true for Michael.

In my judgment, the evidence of the defence has rebutted the statutory presumption of possession under s 37(d) of the Act. Additionally, it is also my judgment that the defence has rebutted the statutory presumption of trafficking under s 37(da) of the Act (see *Mohamed Radhi bin Yaacob v PP* [1991] 3 MLJ 169 as applied in *Sochima Okoye v PP* [1995] 1 MLJ 538). I have no choice but to acquit and discharge the accused at the close of the defence case.

Accused acquitted and discharged.

Reported by Wong Kian Keong